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No. ____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

DONALD G. JOLLY,

Petitioner,

v.

E. J. LISTERMAN, *et al*

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, in the case of a federal employee discharged in part for constitutionally-protected conduct, a federal district court can properly grant summary judgment against the employee, on an *ex parte* basis, without hearing or opportunity for comment, upon receipt of a letter from agency management asserting that the discharge was justified by other charges.

2. Whether, after remand for reconsideration of decision to discharge a federal employee on several grounds, some of which involve constitutionally-protected activity, the requirements of *Mt. Healthy City School Dist. Bd. of Education* v. *Doyle*, 429 U.S. 274 (1977), are satisfied by a letter from agency management asserting that the remaining, unprotected, grounds were sufficient to justify the discharge.

3. Whether limitations on the scope of review can prevent judicial scrutiny of an agency decision which relies upon minor complaints about performance, dredges up new charges of misconduct, and reflects discriminatory imposition of disciplinary measures, to justify, in a *post-hoc* manner, a discharge decision originally based explicitly on grounds which were unlawful.

PARTIES

The parties to this action are Donald G. Jolly, plaintiff, and defendants E. J. Listerman, Regional Representative, Bureau of Retirement and Survivors Insurance, Birmingham, Alabama; Richard S. Schweiker, Secretary of the Department of Health, Education and Welfare, Washington, D.C.; Lyman C. Duncan, Jr., Chief Appeals Officer of the Federal Employee Appeals Authority of the United States Civil Service Commission, Atlanta, Georgia; Ira R. Harrison, Assistant Appeals Officer of the Federal Employee Appeals Authority of the United States Civil Service Commission, Atlanta, Georgia; Robert E. Hampton, Chairman, Civil Service Commission; L. J. Andolsek, Commissioner, Civil Service Commission; and Georgina Sheldon, Commissioner, Civil Service Commission.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Donald G. Jolly ("Jolly") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The unreported opinion of the United States District Court for the District of Columbia, entered on September 4, 1980, is attached as Appendix A. The opinion of the United States Court of Appeals for the District of Columbia Circuit, entered on January 15, 1982 and reported at 672 F.2d 935, is Appendix B. The Order denying petitioner's suggestion for rehearing *en banc*, together with three different statements by five circuit judges, filed on April 23, 1982 and reported at 675 F.2d 1308 (1982), is Appendix C hereto. A previous, unreported, decision of

decision of the Court of Appeals for the District of Columbia, filed December 6, 1979, is Appendix D hereto.

JURISDICTION

The judgment of the District of Columbia Circuit was entered on January 15, 1982. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on April 23, 1982.[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)(1966).

CONSTITUTIONAL PROVISIONS AND STATUTES AND RULES INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Administrative Procedure Act, at 5 U.S.C. § 706 (1966), provides in pertinent part as follows:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
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> * * * *
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
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> * * * *

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[1] Petitioner was granted an extension of time in which to file his petition to September 20, 1982.

(B) contrary to constitutional right, power, privilege, or immunity;

* * * *

(D) without observance of procedure required by law;

* * * *

Rule 56 of the Federal Rules of Civil Procedure provides in pertinent part as follows:

(c) *Motion and Proceedings Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

* * * *

STATEMENT OF THE CASE

Petitioner Donald G. Jolly is a former federal employee at the Social Security Administration ("SSA"), who was discharged in 1974 for "blowing the whistle" on his superior, E. J. Listerman. In a newsletter, Jolly had accused Mr. Listerman of using his position to promote the sale of AMWAY products and distributorships to SSA employees. One of the grounds given by Mr. Listerman for the discharge was that, by such newsletter accusations, Mr. Jolly had created "an atmosphere adversely affecting employee-employer relationships."[1]

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[1] Appendix D, at 69a.

While that charge was later dropped by the Civil Service Commission, additional charges—which the court of appeals in one decision[2] saw as "slight in view of his [Mr. Jolly's] many years of service"—have now been held by a bitterly divided panel to justify the decision to terminate. In the words of Judge Edwards dissenting below, "a career civil servant, with a long and outstanding record of government service, [. . . has been fired . . . because] he "blew the whistle" on corrupt agency supervisors. "This result, as Judge Edwards saw it, is a "miscarriage of justice" with "invidious consequences extending beyond the unlawful discharge."[3]

(a) *Employment History and Facts Surrounding Decision to Terminate.* Donald Jolly entered federal service in 1954 and joined the SSA in 1960. Until the period immediately preceeding his discharge in 1974, Donald Jolly's personnel record reflected a distinguished federal career. His performance record was unblemished; he had risen from a GS 5 level to a GS 11 level by 1969; and he had received over forty commendations and many promotions. Before 1973, he had never received a work evaluation which was less than "outstanding." Never before 1972 had Mr. Jolly been criticized, reprimanded or disciplined for work performance.

In 1972 and 1973, however, Mr. Jolly took two actions which were unpopular with management officials, specifically his superiors Mr. Listerman and Mr. Bruce. First, Mr. Jolly withdrew from a prestigious management staff development program. Second, he published an article in a newsletter accusing Messrs. Listerman and Bruce of conflicts of interest. According to the newslet-

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[3] Appendix C, at 63a.

ter, Messrs. Bruce and Listerman were distributors for AMWAY, a private corporation which sells cosmetics through individual distributors, and they were influencing their subordinates at SSA to join the AMWAY program by favoring AMWAY distributors in promotion and other employment decisions. Shortly after making these charges, Mr. Jolly refused to submit to questioning by his superiors as to the allegations in the newsletter, and shortly after that event Jolly was notified of the termination decision.

Mr. Listerman's first proposal had been to suspend Mr. Jolly for "misconduct in the publishing of unsupported derogatory allegations, inflammatory remarks, and improper inferences in a publication entitled "Newsletter" dated August, 1973." Next, that proposal was withdrawn and replaced with a proposal to separate Mr. Jolly from federal service. This second proposal, which included charges of poor performance, is the first time that Jolly was ever criticized for his work. The charges were as follows:

1. Poor quality of work for the ten-month period of February 5 to December 27, 1972;
2. Failure to cooperate with superiors in four respects, namely:
   a. He continued to accept requests to represent additional employees in grievances against the Agency and failed to secure permission for taking official time away from the branch office;
   b. He received too many telephone calls;
   c. He resigned from a prestigious Management Training Program; and
   d. He refused to answer questions during an interrogation by Management concerning the publication of a newsletter; and

3. Creating an atmosphere adversely affecting employee-employer relationships as a result of the publication of a newsletter.

These charges were contested by Mr. Jolly. The Civil Service Commission rejected the charges in paragraphs 2(c) and 3, but sustained the remaining charges, including those in paragraph 2 (d), *i.e.*, refusal to answer questions about the newsletter.

(b) Mr. Jolly's Complaint and Judicial Proceedings To Date. Jolly filed a complaint in federal court seeking review of the agency decision. He alleged that the real grounds for discharge were union activities and the newsletter publication, both protected by the first amendment. Further, he alleged that his first amendment rights were violated by the fact that one ground for discharge was failure to answer questions about the newsletter.

There have been three appeals here. The first arose when the district court (Pratt, J.) dismissed the complaint for failure by Mr. Jolly to file a timely response to the Government's motion for summary judgment. That action was reversed,[4] and the case was remanded for a determination on the merits. Upon remand, the district court again granted summary judgment for defendants. Jolly's appeal from that decision was successful. In a memorandum decision filed December 6, 1979, the Court of Appeals for the District of Columbia Circuit noted:

> Jolly's principal argument on this appeal is that it is a violation of his First Amendment rights of free speech and association to rely as a ground for dismissal on his refusal to answer questions about his

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[4] *Jolly* v. *Listerman*, No. 77-1300 (D.C. Cir., March 21, 1978).

publication, particularly when one of his questioners was a supervisor he had criticized in his publication.[5]

Next, on February 6, 1980, the district court remanded to the SSA "for further proceedings in accordance with the memorandum [panel decision] attached to the above judgment."[6]

(c) *SSA "Reconsideration" and Most Recent Appeal.* The result of the remand was a letter to the district court from Mr. Harry Overs, Director of SSA's Office of Program Service Centers. That letter, which was unsworn, stated that Mr. Overs had reviewed the record; that Mr. Jolly's removal decision was appropriate; that the charge relating to Mr. Jolly's refusal to discuss the newsletter was not a necessary specification and that removal was warranted without consideration of that charge. Mr. Overs then supported his conclusions with three *additional* complaints, two of which were entirely new charges, not previously considered by the Agency, and as to which Mr. Jolly had no opportunity to respond. The third new charge was merely a restatement of a charge previously rejected by the Civil Service Commission. Mr. Overs' "reconsideration" was undertaken with no notice to Mr. Jolly, no hearing, and no opportunity to submit evidence or argument.

Upon receipt of the SSA letter, counsel for Mr. Jolly promptly communicated to Judge Pratt's chambers their

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[5] Appendix D, at 69a. The court of appeals did not decide this constitutional issue, however. Observing that Jolly's original dismissal was based upon *all* charges in his supervisor's letter, and that the Civil Service Commission had rejected the most serious charges, the court remanded for a reconsideration by SSA. The court stated that reconsideration was particularly important where the grounds for dismissal which are upheld are less flagrant than those which have been rejected. Appendix D, at 70a.

[6] Appendix A, at 1a.

desire for a status conference to determine a procedure for responding to the SSA letter. Nonetheless, the district court (Judge Pratt) proceeded forthwith to affirm its previous grant of summary judgment to defendant.[7] This was the third time that the district court had granted summary judgment to the government.

The district court did not explain its decision; it did not subject Mr. Overs to cross-examination; and it did not require or permit sworn testimony or other evidence. At no point did Mr. Jolly have an opportunity to present any contentions, either legal or factual, with respect to the SSA burden of proof on reconsideration, the contents of the SSA letter, or the procedures to be adopted on remand by either the SSA or the district court.

Mr. Jolly then filed a motion to vacate the judgment, but this motion was summarily denied, again with no hearing. In his motion, Mr. Jolly urged in part that the district court's precipitous action was "in effect an *ex-parte* order that violated the Federal Rules of Civil Procedure and due process of law."

On appeal, Mr. Jolly urged that the dismissal action was both a denial of due process and arbitrary and capricious. He urged that SSA had violated due process by introducing new charges to justify its previous decision; and that the reduced charges were so slight that it was arbitrary and capricious for SSA to adhere to its prior decision. Mr. Jolly's underlying argument was that the record made it clear that the reasons given for discharge were pretextual, *i.e.*, they masked the true, unlawful grounds for the discharge. In addition, Mr. Jolly urged

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[7] *Id.*

that it had been error for the district court to grant summary judgment, without an adversary proceeding, against Mr. Jolly on the basis of the *ex-parte* submission by Mr. Overs at SSA.

(d) *The Decisions on Appeal and on Suggestion for Rehearing.* The case on appeal produced a sharply divided decision. Stressing the very limited scope of review, the majority upheld the termination decision, but totally ignored record evidence relating to Jolly's essential complaint, *i.e.*, that the real reasons for discharge were his withdrawal from the staff development program and his expose of his superiors for use of their positions to promote the sale of AMWAY distributorships and products. The majority did not address the contention that the district court had acted improperly when it dismissed the case simply on receipt of the SSA letter. Nor did the majority speak to the underlying constitutional issues presented by the circumstances of Mr. Jolly's discharge. In dissent, Judge Edwards concluded as follows:

> This is a simple case of *unlawful retaliation* against appellant, Donald Jolly, who—prior to his discharge—had worked for fourteen years with the Social Security Administration ("SSA") at its Southeastern Program Center in Birmingham, Alabama. Mr. Jolly was fired only after he "blew the whistle" on certain SSA officials, by publishing a Newsletter accusing them of being involved in the purchase of AMWAY distributorships—a pyramid sales scheme involving the sale of women's clothing and cosmetics—and then extending preferential treatment to employees who agreed to sell the AMWAY products for them. Two of the officials who had been accused, a Mr. Listerman and a Mr. Bruce, were the principal management officials who acted to effectuate Mr. Jolly's termination.
>
> From the start, it has been evident that management has attempted to hang Mr. Jolly with trumped-

> up charges. Indeed, as will be indicated below, the management disciplinary process has been a farce as the charges against Mr. Jolly have been modified at least four times during the course of the proceedings in this case. For this Court to indulge—much less approve—the government's actions in this case is a travesty and gross miscarriage of justice.[8]

As carefully documented by the dissent, the charges as to Mr. Jolly's work performance were pretextual in nature, having been dredged up in order to justify a termination based on other, unlawful grounds.[9] Judge Edwards was not alone in his conclusions; the appeal "engendered a sharp division on the Court of Appeals," and four judges on two panels had acknowledged the merit of Jolly's contentions.[10]

Judge Edwards concluded not only that the majority opinion was at odds with the record, but it also was in conflict with decisions reached in related cases by the Court of Appeals for the Fifth Circuit.[11]

(e) *The Related Cases.* The related cases arose from the same incidents as involved here. In those cases, *Porter* v. *Califano*,[12] (*Porter I*) and *Porter* v. *Schweiker*,[13] (*Porter II*), the Fifth Circuit dealt with unlawful disciplinary action directed against one of Mr. Jolly's coworkers who protested his discharge. Ms. Ella Porter, a fellow employee at SSA in Birmingham, Alabama, had

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[8] Appendix B, at 30a-31a.

[9] Appendix B, at 33a-39a.

[10] Appendix C, at 61a.

[11] Appendix B, at 48a-49a.

[12] 592 F.2d 770 (5th Cir. 1979).

[13] 648 F.2d 310 (5th Cir. 1981).

been suspended because she distributed a letter defending Mr. Jolly and criticizing Messrs. Listerman and Bruce for their activities in connection with the AMWAY distributorships. The facts, and the relationship between the cases, were set out in *Porter I*:

> The center of the case against Porter and of the first charge in particular is the material she distributed to her fellow employees in 1975. Porter distributed three things in the one mailing she made. First is a letter, dated February 20, 1975, and signed by Porter appealing for "financial and moral support" for Don Jolly, a former President of the American Federation of Government Employees local in the Program Center and a former coworker of Porter's. Jolly had been fired a few months before Porter distributed her letter, and, according to Porter, needed funds for the legal expenses in his appeal of his termination. Before being fired Jolly had made certain charges of conflict of interest against Listerman and Bruce, and in her letter Porter alleged appellees had had Jolly fired because of these criticisms. In addition, the letter again asserted that Listerman and Bruce were corrupt. The basis of this assertion is Listerman's and Bruce's role in AMWAY. AMWAY is a private corporation which apparently sells women's clothes and make-up and which Bruce, Listerman and other Southeastern Program Center employees work or worked for part-time. Porter accused Bruce and Listerman of using government time for AMWAY work and, more significantly, influencing their subordinates in the Program Center to join the AMWAY operation by favoring AMWAY members when making government promotion decisions.
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> Similar criticisms of the AMWAY connection with the office were made to Listerman by Don Jolly in 1971, when he was president of the local of the American Federation of Government Employees. Jolly was fired in 1974, and was in the process of appealing

> his termination with the Civil Service Commission at the time of Porter's suspension. In her letter Porter also alleged that Listerman had had Jolly fired because of his criticisms of AMWAY.[14]

The Fifth Circuit compared the charges against Porter and Jolly, and saw that they were almost identical. Noting the pervasive roles of Messrs. Listerman and Bruce in the retaliatory actions against both Porter and Jolly, the Fifth Circuit held that the suspension of Ms. Porter was arbitrary and capricious and based upon her exercise of first amendment rights. Her allegations of misconduct could not be used as grounds for disciplinary action:

> An employee who accurately exposes rampant corruption in her office no doubt may disrupt and demoralize much of the office. But it would be absurd to hold that the first amendment generally authorizes corrupt officials to punish subordinates who blow the whistle simply because the speech somewhat disrupted the office.[15]

The panel in *Jolly II* relied on *Porter I* in suggesting that Jolly's termination was questionable due to the involvement of his supervisors. As of this time, however, the SSA, the district court, and now the court of appeals in a divided opinion, have all sanctioned a result which is in serious conflict with decisions of the Fifth Circuit on the same set of facts.

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[14] 592 F.2d at 775 (footnotes omitted).

[15] *Id.*, at 773.

REASONS FOR GRANTING THE WRIT

This is not a routine case of a federal employee who refuses to accept the fact that his job performance was unsatisfactory. It is not even a case of a federal employee whose complaints about his treatment may have some merit, but whose termination must be upheld on the basis of deference to administrative agenices and limited judicial review.

To the contrary, this is a case of an employee who was fired for blowing the whistle on his supervisors and whose employer has been rewarded for its persistence in standing by a decision which was unlawful from the start. In the process, the court of appeals has sanctioned district court action granting *ex-parte* summary judgment in violation of Rule 56 of the Federal Rules of Civil Procedure and contrary to due process. The agency and the courts have been allowed to ignore the requirements of *Mt. Healthy City School Dist. Bd. of Education v. Doyle, supra*, and have been permitted to engage in conduct which is so palpably wrong as to be clearly arbitrary and capricious.

The decisions below reflect plain error of a fundamental nature which should not go uncorrected.[16] As the record shows, the district court in its precipitous action violated basic requirements of Rule 56 and the judicial process.[17] Its action was an extraordinary and dangerous departure from the accepted and usual course of judicial proceedings. The agency has been allowed, in direct conflict with controlling precedent of this Court, to punish an employee for exercising his most crucial rights, and that agency

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[16] *See Silber* v. *U.S.*, 370 U.S. 717 (1962)

[17] *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 16 (1940).

action if uncorrected will have wide ramifications for federal employment relations.

(a) *It was an extraordinary and dangerous departure from the accepted and usual course of judicial proceedings for the district court to grant summary judgment against petitioner, without hearing and without opportunity to submit briefs or evidence, on the basis of an unsworn letter by the agency as to the justification for discharge.* The district court, upon receipt of the SSA letter, proceeded immediately to dismiss the complaint, reaffirming its previous grant of summary judgment. Mr. Jolly had no opportunity to respond to the SSA letter, to present argument regarding the SSA burden of proof under *Mt. Healthy*, or to make any other submission.

It is of course appropriate for a district court to grant summary judgment in certain cases involving decisions by administrative agencies.[18] But here the district court ignored the basic and fundamental obligation to give a litigant the opportunity to be heard. At the time the district court acted, *sua sponte*,[19] SSA had submitted an unsworn letter stating its view of the facts, but Mr. Jolly had been given no chance to respond. In *Lockhart* v. *Hoenstein*,[20] the Third Circuit Court of Appeals emphasized the district court's duty:

> to see that the parties have been given a reasonable opportunity to make the record complete or explain

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[18] *NLRB* v. *Red Spot Electric Co.*, 191 F.2d 697 (9th Cir. 1951); *Gaines* v. *Martinez*, 353 F. Supp. 780 (N.D. Tex. 1972); *Zucker* v. *Baer*, 262 F. Supp. 528 (S.D. N.Y. 1967).

[19] The Government had not even asked the district court to dismiss the complaint.

[20] 411 F.2d 455, 459 (3rd Cir. 1969), *cert. denied*, 396 U.S. 941 (1969).

> to see that the parties have been given a reasonable opportunity to make the record complete or explain their inability to do so before ruling on a motion for summary judgment.

Even assuming this fundamental error had not occurred, summary judgment would be inappropriate here. The central factual question presented by the case—the reason for Mr. Jolly's dismissal—remains unresolved. The unsworn SSA letter amounts to no more than a conclusory opinion rendered by an agency charged with unconstitutional discrimination. As noted in *Waldie* v. *Schlesinger*,[21] such materials "are too ambiguous to be accepted as fact, untested by cross-examination." The key issue here concerns SSA's motive or intent in dismissing Jolly,[22] and this is a case involving important first amendment issues. As the Fifth Circuit noted in the related case of *Porter* v. *Califano*:

> As a general rule a court should use Rule 56 summary judgment most sparingly in a First Amendment case such as this involving delicate constitutional rights, complex fact situations, disputed testimony, and

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[21] 509 F.2d 508, 510 (D.C. Cir. 1974), *See also, Quaker Action Group* v. *Hickle*, 429 F.2d 185 (D.C. Cir. 1970).

[22] Noting in *Poller* v. *Columbia Broadcasting System*, 368 U.S. 464, 473 (1981) that "trial by affidavit is no substitute for trial by jury", this Court held that "summary proceedings should be used sparingly in complex antitrust litigation where motive and intent play leading roles." This rule has properly been seen by lower courts to govern other motive-related litigation, and it has direct application here. *Denny* v. *Seaboard Lacquer, Inc.*, 487 F.2d 485 (4th Cir. 1973).

> questionable credibilities. This is especially true where the only affidavits supporting the motion for summary judgment come from officials who are attempting to silence a subordinate who has accused them of corruption, where those affidavits are vague and conclusory, and where the administrative record largely shaped by the officials themselves contains clearly conflicting evidence. Courts must not allow Rule 56 and the interests of judicial economy to become a rubber stamp obscuring rights indelibly printed in the constitution.[23]

For the reasons stated above, the court's action was plain error. Indeed, the district court's action was unprecedented, a fundamental disregard of Mr. Jolly's rights as a litigant in our adversary system.

(b) *The district court's decision, now sanctioned by the court of appeals, conflicts directly on an important question of federal law with the principles established by this Court in Mt. Healthy, which set out a procedure which until now was uniformly applied by federal courts.* In *Mt. Healthy*, the Court established rules which should have been dispositive of this case after remand for "further consideration of the propriety of Jolly's dismissal." But, due to the district court's disregard of the requirements of Rule 56—itself a serious error warranting review—the *Mt. Healthy* standards were not followed, and the lower court decision is, therefore, now also in

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[23] 592 F.2d at 778. The limitations on the grant of summary judgment recognize that it is a drastic remedy, calling for an orderly procedure in which any doubts are resolved against granting the motion. *Munoz* v. *International Alliance of the Theatrical Stage Employees and Moving Picture Machine Operators*, 563 F.2d 205 (5th Cir. 1977); *Tondas* v. *Amateur Hockey Association of the U.S.*, 458 F. Supp. 310 (W.D.N.Y. 1977).

serious conflict with precedent of this Court on an important question of federal law.

In *Mt. Healthy*, the Court established guidelines to be followed in situations, like this one, where disciplinary action is stated to be based on several grounds, some of which are permissible and some of which are not. *Mt. Healthy* involved an untenured public school teacher whose annual contract was not renewed. One of several reasons given for refusal to renew was a telephone call in which the teacher divulged the contents of a new teacher's dress code to a local radio station. The Court acknowledged that conduct to be protected by the first amendment and thus not a valid reason for refusal to renew the contract.

Since other misconduct was also present in the case, the Court needed to develop an appropriate methodology for judging the teacher's claim that his constitutional rights had been violated. The Court was particularly concerned that the presence of constitutional claims not give the employee immunity from discipline for ordinary misconduct. A rule was required which would place the employee in the same position as if the constitutionally protected conduct had not occurred. As the Court noted:

> In other areas of constitutional law, this Court has found it necessary to formulate a test of causation which distinguishes between a result caused by a constitutional violation and one not so caused.[24]

The Court announced the test as follows:

> Initally, in this case, the burden was properly placed upon respondent to show that his conduct was con-

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[24] 429 U.S. at 286.

> stitutionally protected, and that this conduct was a "substantial factor"—or, to put it in other words, that it was a "motivating factor" in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct.[25]

The same rule was applied soon thereafter in *Givhan* v. *Western Line Consolidated School Dist.*,[26] where the lower courts were instructed to allow the employer to "attempt to prove . . . that the decision not to rehire . . . would have been made even absent consideration of . . . [the constitutionally protected conduct.]"

The initial predicate for *Mt. Healthy* is certainly present here. There is no dispute that the newsletter allegations, in which Mr. Jolly "blew the whistle" on his supervisors, were one basis for the original discharge decision. Since corruption by federal employees is a matter of the highest public concern, exposure of this kind of wrongdoing is a most important exercise of rights protected by the first amendment.[27] A second important ground for discharge—refusal to answer questions about the newsletter—was correctly acknowledged by the Court of Appeals in *Jolly II* to present a "difficult constitutional

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[25] *Id.*, at 287.

[26] 439 U.S. 410, 417 (1979).

[27] *Pickering* v. *Board of Education*, 391 U.S. 563, 573 (1968); *Foster* v. *Ripley*, 645 F.2d 1142, 1149 (D.C. Cir. 1981); *Porter* v. *Califano*, 592 F.2d 770, 779 (5th Cir. 1979); *Lapin* v. *Taylor*, 475 F. Supp 446, 449 (D. Ha. 1979).

issue."[28] Under such cases as *Shelton* v. *Tucker*,[29] and *Beilan* v. *Board of Public Education, School Dist. of Philadelphia*,[30] the attempted interrogation of Mr. Jolly, by the very men whom he had accused of wrongdoing, was a violation of his first amendment rights. Even if not so protected a refusal to cooperate in such situation could not be a valid basis for discharge. The Fifth Circuit stated in *Porter I*:

> We conclude that it is unthinkable that a public employee who attempts to expose corruption in her office should be punished for not "cooperating fully" in an interview with the officials she has accused.
>
> * * * *
>
> Such a flagrant conflict of interest in an investigator may or may not by itself constitute a violation of due process, but it clearly can not fairly form the basis of a charge that the employee is improperly and actionably not cooperating with management.[31]

Since the original discharge decision was based on *all* charges, including the two referred-to-above, the burden under *Mt. Healthy* shifted to the Government to show, by a preponderance of evidence, that it would have reached the same result even if the newsletter had not been published or if Mr. Jolly had not refused to cooperate with his interrogation.

That burden has not been satisfied here. The SSA letter simply reports Mr. Overs' "decision that Mr. Jolly's

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[28] Appendix D, at 71a.

[29] 364 U.S. 479 (1960).

[30] 357 U.S. 399 (1959).

[31] 592 F.2d at 785, (footnotes omitted).

removal action was appropriate" on the basis of the charges of unprotected conduct.[22] Even if accepted at face value, that letter does not suggest—much less prove by a preponderance of evidence—that removal would have occurred absent the protected conduct. Of course, due to the district court's unlawful procedure, Mr. Jolly had no chance to argue or establish, either on the record or by new evidence, that his discharge was so totally at odds with SSA's general personnel practices as to demonstrate its pretextual nature.

Until now, federal courts have consistently applied the *Mt. Healthy* guidelines to cases like this one.[23] In such cases, the federal courts have inquired into facts reflec-

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[22] In fact, the letter, which adds new charges, reflects conduct of precisely the sort which was condemned by the District of Columbia Circuit in *Food Marketing Institute* v. *ICC*, 587 F.2d 1285, 1290 (D.C. Cir. 1980):

> At the same time, we must recognize the danger that an agency, having reached a particular result, may become so committed to that result as to resist engaging in any genuine reconsideration of the issues. The agency's action on remand must be more than a barren exercise of supplying reasons to support a pre-ordained result. *Post-hoc* rationalizations by the agency on remand are no more permissible than are such arguments when raised by appellate counsel during judicial review. (*See Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168, 83 S.Ct. 239, 9 L.Ed.2d 207 (1962).

[23] *E.g.*, *Consolidated Edison Co., Inc.* v. *Donovan*, 673 F.2d 61 (2d Cir. 1981) (record reviewed to determine if employer satisfies burden); *Nekolny* v. *Painter*, 653 F.2d 1164 (7th Cir. 1981) (once protected conduct shown to be a motivating factor, burden shifts to employer); *Mazaleski* v. *Treusdell*, 562 F.2d 701, 715 (D.C. Cir. 1977).

tive of the employers' true motive. Failure to do so would produce unacceptable results:

> The claim of a public employee who was terminated in fact for protected conduct could too easily be defeated because his employer asserted a convincing but non-motivating reason for the discharge.[34]

Courts have thus examined the timing and character of complaints of employee misconduct, and have looked at the employers' actions in cases of similar conduct by other employees, to determine whether management decided to "build a case" against the employee for protected conduct offensive to management.[35]

Here, however, the courts below, and most particularly the district court, have chosen totally to ignore the *Mt. Healthy* doctrine. The result is that there never has been an examination to determine whether the employee would have been fired for unprotected conduct standing alone. The Court in *Jolly II* did not consider this issue since it assumed that Jolly would be reinstated in view of the reduced charges.[36] The district court ignored the issue by refusing to conduct any proceedings at all. In effect, SSA has managed to evade scrutiny under *Mt. Healthy* by purporting, at progressive stages of this case, to eliminate the protected conduct from its list of charges against Jolly. But if the SSA's action is reviewed as required by

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[34] 653 F.2d at 1164.

[35] *NLRB* v. *Wright Line*, 662 F.2d 899, 908 (1st Cir. 1981) (examination of employers' past practices); *NLRB* v. *Lloyd A. Fry Roofing Co.*, 651 F.2d 442, 446 (6th Cir. 1981); *Hickman* v. *Valley Local School District*, 619 F.2d 606, 609 (6th Cir. 1980). *Texas Instruments, Inc.* v. *NLRB*, 599 F.2d 1067, 1073 (1st Cir. 1981) (determination of what in fact motivated the employer).

[36] Appendix D, at 69a.

Mt. Healthy, the conclusion will be clear. As Judge Edwards observed:

> The modification of the charges, however, did not change the fact that the real reason for Mr. Jolly's discharge had to do with his publication of the Newsletter. In other words, the First Amendment issue that this Court recognized in *Jolly II*, and the Fifth Circuit recognized in *Porter*, did not disappear merely because of a change in government pleadings.[37]

If the decisions below are allowed to stand, the laudatory effect of the Court's *Mt. Healthy* guidelines will be diluted. Instead of acting under the knowledge that there will be a considered inquiry into questionable action involving constitutional claims, agencies will be free to act unrestrained, and to justify ill-considered actions with *post-hoc* rationalizations free from review.

(c) *The decision below sanctions a relatiatory discharge of a federal employee for "blowing the whistle" on his supervisors in a proceeding which corrupts the administrative processes designed to protect federal employees from arbitrary, capricious and discriminatorily motivated personnel decisions.* The record shows that Mr. Jolly was fired for exposing corrupt activities of his superiors. That much is established by the original proposal to discharge him. And while the charges related to the whistle-blowing were later withdrawn, new charges were added. These new charges, and older charges of poor work performance, were, in the words of Judge

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[37] Appendix B, at 51a.

Edwards, "merely pretextual."[38] As Judge Edwards said so aptly:

> The result reached by the majority is legally unjustified. Worse, the decision of the court today rubber stamps lawless government actions that mock all notions of justice and fair play.[39]

SSA's action herein violates basic precepts of administrative law, in ways which serve to underscore the retaliatory character of the decision to fire Donald Jolly. Thus, on reconsideration, SSA's Mr. Overs relied on *new* charges to justify the discharge decision. Such *post-hoc* rationalization of previous action is forbidden as offensive to the administrative process.[40] Further, even assuming that the SSA had some basis for complaint about Mr. Jolly's work performance, the agency refused to follow its accepted and normal procedure of initially reassigning (instead of firing) employees whose work is unsatisfactory. By departing from its standard procedures, SSA not only showed further that its actions were retaliatory, but also violated its own rules, action clearly unlawful.[41]

The only conclusion which can be fairly drawn from a review of the record is that, "by hook or by crook," SSA was going to stick by its decision to fire Mr. Jolly for reasons which the agency has by now had to retract. Such retaliatory action is by definition arbitrary and capricious

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[38] Appendix B, at 49a-50a.

[39] Appendix B, at 32a.

[40] *E.g.*, *Tygrett* v. *Berry*, 627 F.2d 1279, 1286 (D.C. Cir. 1980); *Food Marketing Institute* v. *ICC*, 587 F.2d 1285, 1290 (D.C. Cir. 1978).

[41] *E.g.*, *DOE* v. *Hampton*, 566 F.2d 265 (D.C. Cir. 1977).

and cannot be permitted to stand.[42] While the scope of review is narrow, the court of appeals impermissibly rubber-stamped arbitrary action. Judge Edwards was correct in his protest below:

> And, while the arbitrary and capricious standard "is highly deferential, and presumes agency action to be valid," in conducting that review we do "not serve as a mere rubber stamp for agency decisions." *Lead Industries Association, Inc.*, v. *EPA*, 647 F.2d 1130, 1145 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980). In upholding Jolly's dismissal without even addressing the most serious charge presented by him, the majority *has* rubber stamped the agency's decision. Reviewing the record with blinders on, it has eviscerated the arbitrary and capricious standard and provided judicial "review" in name only.[43]

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[42] *Porter* v. *Califano*, *supra*.

[43] Appendix C, at 66a.

CONCLUSION

For the reasons stated herein, it is respectfully submitted that the writ should be granted and the decision of the court of appeals reversed.

Respectfully submitted,

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